

# UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA,  
vs. Appellant, No. 2209

William F. Kettenbach, George H. Kester,  
William Dwyer, and  
Frank W. Kettenbach, Appellees.

THE UNITED STATES OF AMERICA,  
vs. Appellant, No. 2210

William F. Kettenbach, George H. Kester,  
Clarence W. Robnett, William Dwyer, The  
Idaho Trust Company, a Corporation, The  
Lewiston National Bank, a Corporation,  
The Clearwater Timber Company, a Cor-  
poration, Elizabeth W. Thatcher, Curtis  
Thatcher, Elizabeth White, Edna P. Kes-  
ter, Elizabeth Kettenbach, Martha E. Hal-  
lett, and Kitty E. Dwyer, Appellees.

THE UNITED STATES OF AMERICA,  
vs. Appellant, No. 2211

William F. Kettenbach, George H. Kester,  
and William Dwyer, Appellees.

## SUPPLEMENTAL BRIEF OF APPELLEES

PEYTON GORDON,  
Attorney for Appellants.  
GEORGE W. TANNAHILL,  
Attorney for Appellees,  
For whom he appears.

Appeals from the District Court of the United States  
for the District of Idaho, Central Division.

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The appellant failed to serve its brief within the time provided by the rules of the Court, the same not having been received by the attorneys for the appellees until February 24th, 1913. In order to reach San Francisco in time to prepare for the argument it was necessary for the attorneys for the appellees to leave their home on February 26, 1913, which they did. The appellees have been afforded no time to reply to the brief of the appellant prior to the argument. A reply was made to certain portions of appellant's brief, page proof of which was received by one of the attorneys for the appellees a few days prior to the time the briefs of the appellees went to the press. Some matters not referred to or urged in the lower court, and which appear from that portion of appellant's brief not received by the appellees prior to the printing of the answer brief, should be answered, and it will be our purpose to deal with those matters in this supplemental brief.

CLAIM THAT ENTRYMEN WERE IN INDIG-  
ENT CIRCUMSTANCES AT THE TIME THEY  
ACQUIRED TITLE TO THE LAND IN QUES-  
TION.

A reference to appellant's brief shows that this claim is only indirectly made, and a very slight effort to show that the entrymen were in indigent circumstances appears. However, for the reason that some reference to the same was made in the evidence and a slight reference to this contention appears in the brief of appellant, we have taken the time and trouble to make an examination of the record, and beg leave to call the court's attention to the same, in relation to each and every entryman.

It will be observed that this contention was not seriously urged in the lower court or in the trial, and it was not referred to by the appellees in the lower court. Neither was it extensively developed in the evidence, for the reason that the appellees did not consider it important under the circumstances.

Then, when there was no evidence bearing upon the financial condition of the entryman, it will be presumed that the entryman was not in indigent circumstances. Appellant carries the burden of proof and where there is no evidence the finding is against appellant.



## VAN V. ROBERTSON

We first call the Court's attention to the evidence of Van V. Robertson. This seemed to be the only entry counsel saw fit to attack in his oral argument, and stated that Robertson testified that he had \$2850 in the Lewiston National Bank, and the records of the bank show that he had no deposit there whatever. We call the Court's attention to page 778 of the record, the evidence of Van V. Robertson, for the purpose of showing that counsel's statement is not only outside the record but that his statement is unfounded in fact. The witness Van V. Robertson, on page 778, testifies:

Q. Did you have at that time the money with which to purchase a timber claim?

A. I did when I filed on it.

Q. You did?

A. Yes, sir.

Q. Did you have it in the bank?

A. Yes, sir.

Q. How much?

A. Oh, I don't remember how much I had. I know I had when I came there.

Q. How much did you have when you came there?

A. I transferred \$2850 from the Camas Prairie Bank to the Lewiston National Bank.

Q. And when was that?

A. I came here sometime in December—late in December.

Q. That was the December before you entered in February?



A. When I moved I transferred this in January. I wouldn't be positive exactly about the dates.

Q. And how did you transfer it—in what form?

A. Why, to do my banking business here instead of doing it in Grangeville. I moved here.

Q. Do you mean you drew a check and transferred it here?

A. Yes, sir.

Q. You didn't take a certificate of deposit?

A. I think I just drew a check.

Q. And opened up an account with the Lewiston National Bank?

A. Yes, sir.

Q. And that was the latter part of 1902 or the first of 1903?

A. Well, yes, it might have been in January, because I came very late in the year. It was the latter part of December that I came here, and it might have been the first of the year that I transferred it; I am not positive.

If Mr. Robertson's statement was not correct it would have been very easy to have made an examination of the books of the Bank of Camas Prairie for the purpose of ascertaining whether or not the witness did have this amount of money. As to when it was transferred is immaterial. It was transferred at some time, and the witness possessed the money at the time he filed his entry, and whether the money was on deposit at the Lewiston National Bank, at the time he filed, or shortly after he filed, is of but little importance.

On page 786 the witness testifies :

Q. Now, did I understand you to say that you deposited in the Lewiston National Bank about \$2,800.00, about January, nineteen hundred and

.....

A. Why, I think it was somewhere along there.

Q. Are you sure it was the Lewiston National Bank?

A. Why, I don't see how I could be mistaken in the bank I was doing business with.

Q. Well, couldn't you make a mistake and not have deposited \$2,800.00, or anything like that amount, in the Lewiston National Bank?

A. Why, let's see: I had that much in the Bank of Camas Prairie when I came here, and in making a deal for the cigar store it might be possible that I gave a check on the Bank of Camas Prairie and transferred the rest of it. Now, it might be possible; but I had that much money in the Bank of Camas Prairie when I came to Lewiston the last of December, and I bought into the cigar store that spring, early in the spring, I don't remember the time exactly, or early in the winter, I don't remember the date, but anyhow I had this money, and if I didn't check it—make one check there before, why I transferred the entire amount: but it is possible that I made another check. The records would show. I have never given it a thought, particularly.

This evidence is important only for the purpose of showing that the entryman was a business man and not in indigent circumstances, and the record fully sustains this contention. In any event there is no evidence to show he had no means.

## GUY L. WILSON

The evidence of Guy L. Wilson appears at page 378 of the record, wherein the witness testifies that he asked the defendant Dwyer to locate him upon a timber claim, and to borrow the money for him. The appellant did not inquire as to the witness' financial condition, and the appellees did not feel called upon to inquire into the same.

## FRED W. SHAEFFER

The evidence of Fred W. Shaeffer appears at page 448 of the record, but the appellant did not inquire as to his financial condition or the property he possessed at the time he made his entry.

## WILLIAM HAEVERNICK and

## ALMA HAEVERNICK

The evidence of these witnesses appears at page 470, wherein it appears that William Havernick and one Holmberg were the owners of a stock of merchandise, which was incorporated, and which was valued at \$7,500.

**WILLIAM J. WHITE and MAMIE P. WHITE**

The evidence of this entryman and entrywoman appears at page 490, of the record, wherein it also appears that they have property, although the appellant did not inquire specifically as to what their property consisted of. William J. White and Mamie P. White are husband and wife, and no contention is made that they are not in good financial circumstances.

**SOREN HANSEN**

The evidence of Soren Hansen appears at page 512 of the record, wherein it appears that he is a farmer by occupation, has a family, and also has property. (Page 514 of the record). The appellant did not inquire concerning his property or of what the same consists.

**WILLIAM McMILLAN**

The evidence of William McMillan appears at page 532 of the record, wherein it appears that he is a farmer, owns his own land, and that the same is clear of incumbrances. The appellant did not inquire further concerning his holdings.

## CHARLES CAREY

The evidence of Charles Carey appears at page 551 of the record, but he was not asked specifically concerning his property or of what it consists, and his financial condition was not inquired into by the appellant.

## CHARLES MYERS

The evidence of Charles Myers appears at page 603 of the record. It appears that he is a farmer, is the owner of a saw mill, and employs from 12 to 15 men in his mill.

## JANIE MYERS

Janie Myers is the wife of Charles Myers, and the same condition appears in relation to the financial condition of this entrywoman. Her evidence appears at page 620 of the record.

## JOEL H. BENTON

The evidence of Joel H. Benton appears at page 636 of the record, wherein it appears that he was selling dry goods at the time he made his entry. The

appellant did not inquire into his financial condition or of what his property consists.

### FRED W. NEWMANN.

The evidence of Fred W. Newman appears at page 671 of the record, wherein it appears that he was running a warehouse, and received a salary of \$75.00 per month; that he was running a warehouse for Frank W. Kettenbach; that he owned the house in which he lived, but paid rent upon the land. The appellant did not inquire as to his financial condition nor as to his property interests.

### DANIEL W. GREENBURG

The evidence of Daniel W. Greenburg appears at page 700, wherein it appears that he was a newspaper man; that he borrowed the money for the purchase of the land; that he had a part of the money, and knew that he could get the balance at almost any place. (Page 703 of the record).

### CHARLES DENT

The evidence of Charles Dent appears at page 716 of the record, wherein it appears that the wit-

ness has a family; that he rafts some; that he has a little stock and ranch of 160 acres (Page 717 of the record).

### EDNA P. KESTER

The evidence of Edna P. Kester appears at page 736 of the record, wherein it appears that she is the wife of George H. Kester; that her husband gave her the money for the purchase of the land; that she still retains the title to the same.

### ELIZABETH WHITE

The evidence of Elizabeth White appears at page 743 of the record. The appellant did not inquire concerning her property interests but it appears from her testimony that she is an extensive property owner.

### FRANK J. BONNEY

The evidence of Frank J. Bonney appears at page 796 of the record, wherein it appears that he is a carpenter and machinist; that he owned a homestead free of incumbrances, and had part of the



money to pay for the land. The appellant did not inquire further concerning his property interests.

### CLINTON E. PERKINS

The evidence of Clinton E. Perkins appears at page 716 of the record, wherein it appears that he is a married man and has a family; is a farmer by occupation; that his farm is worth \$2,500, and was not mortgaged at the time he filed upon the land in question, but he has mortgaged the same since that time for \$750. That he sold timber and cattle for the money to make final proof, and had more than \$400 in cash.

### FRANCES E. JUSTICE

The evidence of this witness appears at page 843 of the record, wherein it appears that she owns her own home, but that the same was mortgaged, and that she could not mortgage it again for the money to pay the purchase price. That she tried to borrow the money from a Mr. Crocker, and finally asked Mr. Dwyer as a favor if he would borrow it for her. The appellant did not inquire concerning her other property interests.

## GERRY VANARTSDALEN

The evidence of Gerry VanArtsdalen appears at page 836 of the record, wherein it appears that he is a freighter by occupation; that he owned a tract of land at the time he made his entry having purchased his father's homestead (page 866 of the record). That he paid the purchase price of his land; borrowed none of the money, and the appellant did not inquire further concerning his property interests.

## BERTSALL H. FERRIS

The evidence of this witness appears at page 873 of the record, wherein it appears that he is an electrician, and draws a salary of from \$65 to \$70 per month. That he paid his own expenses to the land. (Page 876 of the record). The appellant did not inquire concerning his property holdings.

## HIRAM F. LEWIS

The evidence of Hiram F. Lewis appears at page 901 of the record, wherein he testifies that he made the arrangements for his own claim and that of his brother, Edward M. Lewis; that he is an engineer by occupation, and was working for \$70 per month. That he had money of his own at the time he acquir-

ed the land, either \$300 or \$400. That he used \$200 of his own money to purchase the land. The appellant did not inquire concerning his property interests.

### JOHN E. NELSON

The evidence of John E. Nelson appears at page 1038 of the record, where it appears that he is a married man, and is a salesman for the Lewiston Mercantile Company. That he paid his own expenses, for filing fees, and the money to make final proof was handed to him by a Mr. Miller. The witness testifies at page 1051:

“I considered my worldly goods worth a great deal more than \$400.”

The appellant did not inquire specifically concerning his property interests.

### CHARLES W. TAYLOR

The evidence of Charles W. Taylor appears at page 1058 of the record. He borrowed money of Jackson O'Keefe to pay the purchase price. The appellant did not inquire concerning his property interests or his financial condition.

## EDGAR J. TAYLOR

The same condition appears in relation to the evidence of Edgar J. Taylor, whose evidence appears at page 1110 of the record.

## DAVID S. BINGHAM

The evidence of David S. Bingham appears at page 1139 of the record, wherein it appears that the witness was working for O'Keefe and George H. Kester on an irrigation project at Cloverland at the time he filed upon his land, and that his salary was \$75 per month. That his wife was running a hotel at Cloverland at the time. That he had quite a bit of money coming to him, and wanted to buy a ten-acre irrigated tract. (Page 1154 of the record). The appellant did not inquire specifically concerning his property holdings or his financial condition.

## EDGAR H. DAMMARELL

The evidence of Edgar H. Dammarell appears at page 1171 of the record, wherein he testifies that he was living on a homestead at the time he acquired title to the land; borrowed the money of Jackson O'Keefe to pay the purchase price (page 1175 of the

record). That he had theretofore purchased a thirty-acre irrigated tract of land from Jackson O'Keefe, and let his father have twenty acres of the same. (Page 1182 of the record).

### JOSEPH H. PRENTICE

The evidence of this witness appears at page 1125 of the record. The witness testifies that he borrowed the money of Jackson O'Keefe to pay for the land. The appellant did not inquire concerning his property interests or his financial condition.

### JOHN H. LONG

The evidence of John H. Long appears at page 1252 of the record. The witness states that he was working around and attending to investments at the time. The appellant did not inquire concerning his property interests or his financial condition.

### FRANCIS M. LONG

The evidence of Francis M. Long appears at page 1278 of the record. The witness testifies he had money of his own he could not get hold of at the time he made his final proof; that he intended to pay

the claim out and hold it. (Page 1281 of the record). The appellant did not inquire as to his financial condition or property interests.

#### BENJAMIN F. LONG

The evidence of this witness appears at page 1297 of the record. The appellant did not inquire concerning his property interests or his financial condition.

#### GEORGE RAY ROBINSON

The evidence of George Ray Robinson appears at page 1317 of the record. The appellant did not inquire concerning his financial condition or property holdings.

#### ELLSWORTH M. HARRINGTON

The evidence of this witness appears at page 1354 of the record. The witness testifies he is an engineer by occupation; has a family, works for a salary of \$3.00 per day that he received money from Robnett to make his final proof. Page 1357 of the record. The appellant did not inquire concerning his property interests or financial condition.

## MISS ELIZABETH KETTENBACH

The evidence of this witness appears at page 1566 of the record. She inherited money from her mother's estate to pay for the land, and borrowed money from William F. Kettenbach temporarily, as a note she had expected would be paid at the time she would make her final proof was not paid. (Page 1569 of the record).

## MARTHA E. HALLETT

The evidence of Martha E. Hallett appears at page 1592 of the record. Her husband left her an estate of probably \$100,000, and at pages 1901-2 the witness testifies that shortly before she acquired title to the land in question the defendant George H. Kester had collected a note due her in Portland amounting to about \$16,000. (Page 1608 of the record.)

## BENJAMIN F. BASHOR

The evidence of Benjamin F. Bashor appears at page 2090 of the record. That he was County Assessor immediately prior to acquiring title to the land. The appellant did not inquire concerning his property interests or financial condition.



## JAMES T. JOLLY

The evidence of this witness appears at page 1156 of the record. That he was a teamster and farmer. He has a family; owns his own home and had 100 acres under cultivation. The appellant did not inquire concerning his property interests or financial condition.

## EFFIE A. JOLLY

Effie A. Jolly is the wife of James T. Jolly.

## CHARLES E. LONEY

The evidence of Charles E. Loney appears at page 2745 of the record. He testifies that he had about \$150 of his own money which he used in making his final proof; that he is a farmer by occupation. The appellant did not inquire as to his property holdings or financial condition. He testified that he had recently sold a boiler and engine and this \$150 was derived from that source. (Page 2755 of the record).

## CHARLES E. SMITH

The appellant did not inquire concerning the financial condition of this witness. His evidence appears at page 2896 of the record.

## LON E. BISHOP

The appellant did not inquire concerning the financial condition of Lon E. Bishop.

We submit that the evidence of those witnesses, during whose testimony their financial condition was touched upon, wholly fails to support counsel's contention that the witnesses were in indigent circumstances; and we submit, further, that where there is no evidence at all on the question of a witness's financial condition, no presumption arises, or should be indulged, that the witness was in indigent circumstances. On the contrary, where no evidence appears, the legal presumption is that the witness was not in indigent circumstances, but was solvent, and in support of this contention we invite the Court's attention to the following authorities:

In Vol. 7. Encyc. of Evidence, Title "Insolvency," page 482, it is said:

"The fact of solvency is always presumed until insolvency is established, and he who asserts the fact of insolvency has the burden of proving it." (Citing authorities; and in 1910 Supplement of same, many additional authorities are cited).

"Every man is presumed solvent until shown to be insolvent."

Warren vs. Robison

70 Pac. 989,

25 Utah 205.

“In the absence of an allegation to the contrary, it will be presumed a firm was solvent when it sold its property.”

Jenson vs. Montgomery,

80 Pac. 504,

29 Utah 89.

CLAIM THAT THE ENTRYMEN WERE SOLICITED BY THE DEFENDANTS OR THEIR AGENTS, EMERY, O'KEEFE AND STEFFEY TO FILE UPON TIMBER LAND.

Upon examination of the appellant's brief we find various discussions relative to the entrymen being solicited by the defendants or their agents to file upon timber lands, and on page 253 of appellant's brief counsel uses the following language:

“The fact that every entry was made at the solicitation of one of said defendants or of their agents or co-conspirators, Emery, O'Keefe and Steffey, \* \* \*

We have made an examination of the record for the purpose of ascertaining the truthfulness of this statement, and find that the language used by counsel is wholly unsupported by the record. It seems to us that it could be little short of a deliberate at-

tempt to mislead the Court and unjustly impose upon the defendants. The bills in equity, as consolidated, are three in number, to-wit: No. 388, involving 16 entries, No. 406, involving 38 entries, and No. 407, involving 8 entries, aggregating 62 entries. Appellant admits, on page 290 of his brief, the validity of the following entries: John W. Killinger, William E. Helkenberg, Fred E. Justice, Charles W. Harrington and Gerry VanArtsdalen, and upon page 327 counsel admits the validity of the entry of Ivan R. Cornell, Rowland A. Lambdin and Fred W. Shaeffer, which were conveyed to the Potlatch Lumber Company, and the validity of these entries is, in effect, admitted for the reason that there is little in the record to show that the Potlatch Lumber Company is not an innocent purchaser, thus leaving for consideration here 54 entries.

A diligent search of the record fails to show that a single entryman was solicited by the defendants William Dwyer or William F. Kettenbach. There is no contention that entrymen were solicited by George H. Kester, save and except Ivan R. Cornell and Fred W. Shaeffer. William McMillan testifies, at page 535 of the record, that Kester discussed the question of taking up a timber claim with him, but the evidence falls far short of showing solicitation.

## ELLSWORTH M. HARRINGTON

(Page 1349 of the record)

The witness testifies that he first spoke to Clarence W. Robnett regarding his being located upon a timber claim.

The following entrymen were solicited by the defendant Clarence W. Robnett:

Robert O. Waldman, page 3725 of the record;

Soren Hansen, page 517 of the record;

Drury M. Gammon, page 2102 of the record;

Carrie D. Maris, page 2085 of the record;

John H. Little, page 1609 of the record;

Benjamin F. Bashor, page 2092 of the record;

Bertsall H. Ferris, page 873 of the record.

George Ray Robinson testifies that Ferris first spoke to him concerning the taking up of a timber claim. Then he went to see Robnett. (Page 1319 of the record).

F. D. Morrison says that Dwyer spoke to him about going into the timber business with him, but he did not take a claim. (Page 1221 of the record). This is denied by Dwyer.

Sherburn says that Dwyer talked with him about taking a timber claim, but it was a joke.

Wynn Peffley says that he went to Kester, and first talked with Kester about locating him upon a timber claim. (Page 1216 of the record).

Ivan R. Cornell says that Kester first spoke to him about taking up a timber claim. (Page 2860 of the record) Kester admits that he talked with Cornell about taking up a timber claim, but it was in an effort to help Cornell, and after Cornell had repeatedly borrowed small sums of money from Kester, and after Cornell had asked Kester to obtain employment for him, and on account of Cornell and Kester being old schoolmates at Bishop Scott Academy, he desired to render him assistance if he could; that he had no agreement for the purchase of his claim.

Fred W. Shaeffer testifies at page 450 of the record that Kester first spoke to him about taking up a timber claim, and Kester explains that Shaeffer first spoke to him (Kester) about taking up a timber claim, and that Kester loaned money to him with which to pay the purchase price.

This is the extent of the entrymen claimed to have been solicited by Kester, save and except the appearance in the record, over the defendants' objection, of some reference to the witness Lambdin ac-

quiring title to timber land, and that Hutchins first spoke to the witness Lambdin concerning it.

The witness John P. Roos, who did not take a timber claim, says that Kester first spoke to him, and wanted to buy his right, (Page 1209 of the record). This is denied by Kester.

Ellsworth M. Harrington, (page 1349 of the record), testifies that he first spoke to Clarence W. Robnett regarding his being located upon a timber claim.

Wren Pierce did not testify, and there appears no evidence either way.

Joseph B. Clute did not testify, and there appears no evidence either way.

John H. Long, whose evidence appears at page 1254 of the record, testifies that he, with his father and brother, went to see Robnett concerning their being located upon a timber claim. To the same effect is the evidence of Frances M. Long and Benjamin F. Long.

Edna P. Kester testifies, (at page 738 of the record), that her husband, George H. Kester, the defendant, did not want her to take a timber claim, but she insisted and finally persuaded him to let her exercise her right.



Elizabeth Kettenbach testifies, (at page 1558 of the record), that she herself first suggested going to the timber and taking a timber claim.

To the same effect is the evidence of William J. White, appearing at page 493 of the record, and of Mamie P. White, to the same effect, appearing at page 494 of the record.

Martha E. Hallett testifies that she first broached the subject herself. (Page 1594 of the record).

Daniel Greenburg testifies that he first spoke to Dwyer about being located on a timber claim. (Page 701 of the record).

Hattie Rowland did not appear or testify, and there appears to be no evidence either way.

William Haevernick testifies that he was located by a Mr. Mortimer, and had no conversation with either of the defendants or anyone connected with them in any manner concerning the taking up of a timber claim. (Page 473 of the record).

Alma Haevernick testifies to the same state of facts, and that her husband attended to the business for her.

W. B. Benton was a locator, and it was unnecessary for him to apply to anyone, or have anyone consult him about taking up a timber claim, and there is no evidence that he was consulted by either

of the defendants or by anyone connected with them.

Joel H. Benton testifies that he first spoke to W. A. Smith concerning his locating him upon a timber claim. (Page 637 of the record).

Van V. Robertson testifies that he first spoke to Ed Knight concerning his being located upon a timber claim. (Page 776 of the record).

John E. Nelson says that he first spoke to H. R. Miller, and had no arrangements with Robnett or either of the defendants. (Page 1041 of the record.)

Frederick W. Newman states that he applied to Fred Emery to be located upon a timber claim. (Page 674 of the record).

Lon E. Bishop testified, but there is no evidence as to who spoke to him concerning the taking up of a timber claim, and it does not appear that either of the defendants or anyone else solicited him to take up a timber claim.

Charles Smith testifies that he and Ben Clute first spoke to Fred Emery about taking up a timber claim; that they talked between themselves and concluded if they could take a timber claim, and sell it, it would enable them to hold their homesteads. (Page 2996 of the record).

Charles Dent testifies that Emery, in the course of a conversation, asked him if he had ever taken a

timber claim, but it does not appear that Emery solicited him to take up a timber claim. (Page 716 of the record).

The witness Hyde did not appear and testify, and there is no evidence either way as to his being solicited.

Guy L. Wilson testifies that he first went to Dwyer's home to see about being located on a timber claim. (Page 371 of the record).

Frances A. Justice testifies that she first went to see Mr. Dwyer for the purpose of being located upon a timber claim. (Page 847 of the record).

Hiram F. Lewis testifies that he first went and talked with John E. Nickerson about being located on a timber claim; went to the timber, didn't like the claim, and then called on William Dwyer and asked to be located upon a timber claim. (Page 903 of the record).

Edward M. Lewis testifies that he first talked with his brother, Hiram F. Lewis about being located on a timber claim, and Hiram F. Lewis testifies that he asked Dwyer to locate the witness and his brother, Edward M. Lewis, upon a timber claim.

George Morrison did not appear and testify, and there is no evidence either way concerning his being located upon a timber claim.

## STEFFEY GROUP

Janie Myers testifies (at page 621 of the record) that she applied to Steffey, and asked Steffey to locate her upon a timber claim.

Clinton E. Perkins testifies that he applied to Steffey, and asked Steffey to find him a timber claim. (Page 820 of the record).

Mary E. Loney testifies that she sent Steffey word she wanted a timber claim. (Page 2721 of the record).

Charles E. Loney testified that he applied to Steffey to be located on a timber claim (page 2747 of the record).

Frank J. Bonney testifies that he first spoke to Steffey about being located on a timber claim. (Page 793 of the record).

James T. Jolly testifies that he first applied to Steffey, and asked to be located upon a timber claim. (Page 2658 of the record).

Effie A. Jolly testifies that she first applied to Steffey and asked to be located upon a timber claim.

Charles S. Myers testifies that he first applied to Steffey and asked to be located upon a timber claim.

## THE O'KEEFE GROUP

David S. Bingham testified that Jackson O'Keefe first spoke to him about being located on a timber claim. (Page 1141 of the record).

Charles W. Taylor testifies (at page 1063 of the record) that Jackson O'Keefe first spoke to the witness about taking up a timber claim.

Edward J. Taylor testifies (at page 1111 of the record) that his brother, Charles W. Taylor, first spoke to the witness about taking up a timber claim.

Edgar H. Dammarell testifies (at page 1173 of the record) that Charles W. Taylor first spoke to the witness about taking up a timber claim.

Joseph H. Prentice testifies (at page 1226 of the record) that Charles W. Taylor first spoke to the witness about taking up a timber claim.

Jackson O'Keefe was deceased at the time of the hearing and did not testify, and there is no evidence either way concerning his taking up a timber claim, but George H. Kester testifies that Jackson O'Keefe first spoke to him concerning his being located upon a timber claim.

We have endeavored to point out the pages wherein the witnesses have testified, and call the Court's attention to their evidence as to what induced them to take up a timber claim, and in so doing we have

disregarded the evidence of the witness Clarence W. Robnett. We feel justified in doing this for the reason that in these cases Clarence W. Robnett is in conflict with the entrymen, and the lower court found that the conditions under which he testified to be such that he was not justified in assuming that his evidence was true.

The defendants are not bound by the knowledge of Robnett concerning the validity of any of the entries with which he had to do, for the reason that he was seeking to sell the land, and would not disclose the invalidity of the entries, or the irregularities in the acquisition of title, to those to whom he desired to sell.

We call the Court's attention to the case of *Melton vs. Pensacola Bank & Trust Company*, 190 Fed. 126, in which the court says:

"Where the cashier of a bank pledged notes with such bank as collateral security for his own indebtedness, the bank is not chargeable with his knowledge of any infirmity in such notes."

"Knowledge or notice acquired by officer or agent of bank in private business, or outside scope of duties, as affecting its liability: See Note, *McCalmont vs. Lanning*, 84 C. C. A., 139."

*Real Estate Trust Company of Philadelphia vs. Washington A. & M. T. V. Railway Company*, (Circuit Court of Appeals, 3rd Circuit).



(Syllabus) "2. *Knowledge of Fraud.* A bank has no constructive notice of acts by an officer which he would not naturally disclose to it."

"3. Knowledge of fraud of the Trust Company's President, in depositing bonds of another as collateral to fictitious loans for his own benefit, is not imputable to the Company."

*Perry Naval Store Company vs. Caswell*  
57 So. 660.

## ARGUMENT ON QUESTION OF CROSS EXAMINATION OF APPELLANT'S WITNESSES

On page 255 of appellant's brief appears a reference to the cross-examination of appellant's witnesses, and quote therefrom the following:

"The cross examination of these Government witnesses was most remarkably protracted, constituting probably one-half the testimony of the witnesses, and being certainly of a volume enormously disproportionate to the examination in chief."

For the purpose of testing the truthfulness of this statement we have made a careful examination of the evidence of the various witnesses, and beg leave to call the Court's attention to the same as follows:

Guy L. Wilson—				Pgs of record
Direct examination,	50	pages		
Cross	"	9	"	374-433
Ella Wilson				
Direct examination,	11	pages		
Re-direct	"	1	"	
Cross	"	2	"	434-447



Fred W. Shaeffer,				
Direct examination,	16	pages		
Cross	"	5	"	
Re-direct	"	1	"	448-469
William Haevernick,				
Direct examination,	14	pages		
Cross	"	1	"	470-485
Alma Haevernick,				
Direct examination,	3	pages		
Cross	"	1	"	
Re-direct	"	1	"	485-490
William J. White,				
Direct examination,	20	pages		
Cross	"	1	"	
Re-direct	"	2	"	490-512
William McMillan,				
Direct examination,	17	pages		
Cross	"	2	"	532-551
Charles Carey,				
Direct examination,	24	pages		
Cross	"	6	"	
Re-direct	"	7	"	551-588
Mamie P. White,				
Direct examination,	13	pages		
Cross	"	1	"	588-602
Charles S. Myers,				
Direct examination,	14	pages		
Cross	"	4	"	602-620
Mrs. Janie Myers,				
Direct examination,	13	pages		
Cross	"	3	"	620-636
Joel H. Benton,				
Direct examination,	13	pages		
Cross	"	3	"	
Re-direct	"	2	"	636-671

Frederick W. Newmann,				
Direct examination,	23	pages		
Cross	"	1	"	
Re-direct	"	3	"	671-700
Daniel W. Greenburg,				
Direct examination,	14	pages		
Cross	"	1	"	700-715
Charles Dent,				
Direct examination,	17	pages		
Cross	"	2	"	716-736
Edna P. Kester.				
Direct examination,	5	pages		
Cross	"	2	"	736-743
Elizabeth White,				
Direct examination,	28	pages		
Cross	"	2	"	743-773
Van V. Robertson,				
Direct examination,	18	pages		
Cross	"	3	"	
Re-direct	"	1½	"	774-795
Frank J. Bonney,				
Direct examination,	17	pages		
Cross	"	2	"	
Re-direct	"	1	"	795-812
Clinton E. Perkins,				
Direct examination,	19	pages		
Cross	"	4	"	
Re-direct	"	5	"	816-843
Frances A. Clausen (Justice).				
Direct examination,	53	pages		
Cross	"	9	"	844-862
Re-direct	"	3	"	1411-1422

Gerry VanArtsdalen,				
	Direct examination,	10	pages	
	Cross	"	1/2 "	863-873
Bertsal H. Ferris,				
	Direct examination,	23	pages	
	Cross	"	2 "	
	Re-direct	"	2 "	873-900
Hiram F. Lewis,				
	Direct examination,	67	pages	
	Cross	"	8 "	
	Re-direct	"	26 "	901-1003
Albert J. Flood,				
	Direct examination,	6	pages	
	Cross	"	12 "	
	Re-direct	"	2 "	1003-1023
Walter Williams,				
	Direct examination,	5	pages	
	Cross	"	9 "	
	Re-direct	"	1 "	1023-1038
John E. Nelson,				
	Direct examination,	17	pages	
	Cross	"	2 "	
	Re-direct	"	2 "	1038-1058
Charles W. Taylor,				
	Direct examination,	18	pages	
	Cross	"	9 "	
	Re-direct	"	17 "	1058-1110
Edgar J. Taylor,				
	Direct examination,	14	pages	
	Cross	"	4 "	
	Re-direct	"	1 "	1110-1139
David S. Bingham,				
	Direct examination,	17	pages	
	Cross	"	12 "	
	Re-direct	"	3 "	1139-1171

Edgar H. Dammarell,			
Direct examination,	26	pages	
Cross	2	"	
Re-direct	2	"	1171-1201
Samuel C. Hutchins,			
Direct examination,	3	pages	
Cross	1	"	
Re-direct	1	"	1201-1205
Wynn Peffley,			
Direct examination,	3	pages	
Cross	2	"	1205-1209
John P. Roos,			
Direct examination,	2	pages	
Cross	3	"	1209-1214
Andrew Sherburn,			
Direct examination,	2	pages	
Cross	1	"	1214-1218
F. D. Morrison,			
Direct examination,	3	pages	
Cross	3	"	1218-1224
Joseph H. Prentice,			
Direct examination,	23	pages	
Cross	2	"	
Re-direct	2	"	1225-125?
John H. Long,			
Direct examination,	24	pages	
Cross	1	"	1252-1278
Francis M. Long,			
Direct examination,	17	pages	
Cross	2	"	1278-1297
George Ray Robinson,			
Direct examination,	23	pages	
Cross	5	"	
Re-direct	2	"	1297-1317

Benjamin F. Long,				
Direct examination,	17	pages		
Cross	"	3	"	1317-1346
Ellsworth M. Harrington,				
Direct examination,	15	pages		
Cross	"	4	"	
Re-direct	"	1	"	1347-1366
Elizabeth Kettenbach,				
Direct examination,	20	pages		
Cross	"	11	"	
Re-direct	"	4	"	1557-1592
Martha E. Hallett,				
Direct examination,	15	pages		
Cross	"	2	"	1592-1609
John H. Little,				
Direct examination,	14	pages		
Cross	"	4	"	1609-1627
E. N. Brown,				
Direct examination,	11	pages		
Cross	"	17	"	
Re-direct	"	8	"	1638-1684
Mabel K. Atkinson,				
Direct examination,	4	pages		
Cross	"	1	"	1684-1689
Joseph Alexander,				
Direct examination,	11	pages		
Cross	"	1	"	1733-1745
Harvey J. Steffey,				
Direct examination,	68	pages		
Cross	"	57	"	
Re-direct	"	7	"	1745-1877
Kitty E. Dwyer,				
Direct examination,	11	pages		
Cross	"	None		1877-1889

Edward C. Smith,				
Direct examination,	54	pages		
Cross	"	None		1889-1943
R. Clyde Beach,				
Direct examination,	4	pages		
Cross	"	None		1943-1948
Edward C. Smith (recalled),				
Direct examination,	10	pages		
Cross	"	None		1948-1953
B. M. Gregory,				
Direct examination,	12	pages		
Cross	"	None		1972-1984
Edward C. Smith (recalled 2nd time),				
Direct examination,	7	pages		
Cross	"	13	"	2016-2040
Edward M. Lewis,				
Direct examination,	15	pages		
Cross	"	8	"	
Re-direct	"	4	"	2042-2069
Carrie D. Maris,				
Direct examination,	15	pages		
Cross	"	6	"	2069-2090
Benjamin F. Bashor,				
Direct examination,	9	pages		
Cross	"	1	"	2090-2100
Drury M. Gammon,				
Direct examination,	15	pages		
Cross	"	3	"	2101-2119
Michael J. Dowd,				
Direct examination,	10	pages		
Cross	"	2	"	2119-2131
Harvey J. Martin,				
Direct examination,	16	pages		
Cross	"	5	"	2131-2153

J. G. Fralick,			
Direct examination,	4	pages	
Cross	2	"	2196-2202
James T. Jolly,			
Direct examination,	21	pages	
Cross	12	"	2656-2689
Effe A. Jolly,			
Direct examination,	14	pages	
Cross	8	"	2689-2716
Mary A. Loney,			
Direct examination,	23	pages	
Cross	8	"	2717-2748
Charles F. Loney,			
Direct examination,	17	pages	
Cross	3	"	2745-2765
John E. Chapman,			
Direct examination,	13	pages	
Cross	16	"	2769-2798
Ivan R. Cornell,			
Direct examination,	33	pages	
Cross	28	"	2800-2861
Harvey J. Steffey (recalled),			
Direct examination,	7	pages	
Cross	9	"	2963-2979
Lon E. Bishop,			
Direct examination,	15	pages	
Cross	4	"	2979-3019
Charles Smith,			
Direct examination,	23	pages	
Cross	1	"	2995-3019
John C. Jensen,			
Direct examination,	10	pages	
Cross	8	"	3031-3049



Direct and Re-direct, 1406 pages.

Cross and Re-cross, 281½ pages.

This exclusive of the direct and cross examination of Clarence W. Robnett.

#### ATTEMPT TO DISTINGUISH BETWEEN THE PRESENT CASE AND THE CASE OF UNITED STATES VS. BARBER LUMBER COMPANY.

Counsel in his argument attempts to distinguish between the case at bar and the case of the United States vs. The Barber Lumber Company, and argues that Barber and Moon and the officers of the Barber Lumber Company were in the East, and did not come in contact with the individual entrymen. This condition is no different from the conditions surrounding the entrymen in the present case. Take for instance the Steffey Group. It is clear that none of these entrymen came in contact with the defendants. They lived at Pierce City; possibly a hundred miles from the City of Lewiston, (a large portion of the distance covered by stage only). The defendants had no opportunity to know the conditions surrounding their entries, and, therefore, the case under consideration here is no different in relation to the Steffey Group than the Barber Lumber Company case.

In the O'Keefe Group, comprising several entries, the entrymen resided at Cloverland, in the State of Washington, many miles from the City of Lewiston, (with no communication except by stage), and did not come in contact with the defendants. The defendants had no opportunity to know the facts and circumstances surrounding the acquisition of title to the land.

In relation to the Robnett Group, we call the Court's attention to the evidence of Joel H. Benton, appearing at page 667 of the record, wherein the witness testifies:

Q. I will ask you, Mr. Benton, if during your talks with Mr. Robnett if he said anything to you about not letting Mr. Kester or Mr. Kettenback know of his purchasing the land, or of his arrangements with you?

A. He did, yes, sir; he told me several times he had no connection with them whatever; that he had nothing to do with them at all; it was on his own account.

Q. He was doing business on his own account?

A. On his own account, yes sir. He told me that several times.

Q. And what was his actions in regard to them not knowing what he was doing in regard to your land? State whether or not he tried to keep that from them, or talked with you where they couldn't hear you.

A. He did; he tried to keep it secret.

Q. He tried to keep it from them?

A. Yes, sir. He took me out in the directors' room, and didn't want anybody to hear what he was doing.

### JOHN H. LITTLE

We also call the Court's attention to the evidence of John H. Little, page 1624 of the record:

Q. Then your arrangement with Robnett was not carried out?

A. No, it was not.

Q. And did you say that Kettenbach told you that he had nothing to do with Robnett's deal, or the sale that Robnett was to make of the land, or something of that sort?

A. Well, yes, if I remember correctly. It is all so long ago that the deal nearly all has gone from my mind, except just the main points of the case. \* \* \* \* \*

To the same effect is this witness's evidence, appearing on page 1620 of the record.

### CARRIE D. MARIS REXFORD

On page 2089 the witness Carrie D. Maris Rexford states that she had no understanding or agreement with either of the defendants, and testifies as follows:

Q. Now, at any of these times when you entered the bank to see Robnett you had no conversation with Kester or Kettenbach, did you?

A. Never. Clarence Robnett is the only one I ever had any dealings with at all.

Q. Did he make an effort to have his conversations out of the presence of Kettenbach and Kester?

A. Well, I don't know that these gentlemen were ever present at the conversations at all. Now, possibly,—I couldn't tell you,—possibly they were in the bank when he handed me out that money; but I never had any dealings with them, and whoever it was behind there in the bank I would pass the time of day.

Q. You never had any agreement or understanding that you would sell your land to Kester and Kettenbach?

A. Never. That was never mentioned. \* \* \* \*

### DRURY M. GAMMON

On page 2111 the witness Drury M. Gammon testifies:

Q. Mr. Gammon, you never had any arrangement or agreement with Kester or Kettenbach regarding your claim, did you.

A. No, sir.

Q. You never had any conversation with them at all?

A. No, sir.

Q. Neither of these gentlemen were present at any time when you talked with Clarence Robnett regarding it?

A. No, sir.

### COLBY & EMERY GROUP

The record shows that these entrymen all live on the North Fork of the Clearwater River, with no means of transportation except by pack horses or team many miles from the City of Lewiston, and in a place where they would not ordinarily come in contact with the defendants.

These various groups comprise practically all the claims about which there appears to be any question, and it appears to us that the defendants had little or no more opportunity to come in contact with the entrymen than did the defendants in the Barber Lumber Company case.

The defendants all testify that they knew nothing about the dealings of Robnett, or his negotiations or transactions with the entrymen; that it was never brought to their attention, and the evidence of the witnesses hereinbefore referred to bears out that contention and strongly corroborates the evidence of the defendants in that respect.

### SPECULATION

On pages 278 to 290 of appellant's brief is an argument and discussion under the heading of "Speculation." Counsel sets forth the argument appearing in the Congressional Record, relative to the enact-

ment of the Stone & Timber Law, and wherein certain features of the law were debated, especially the speculative feature of the same. From an examination of these debates quoted, and the record in relation to the arguments in support of and against the enactment of the law, it appears that the discussions quoted were all prior to the amendment of the bill striking out the provisions that the applicant should swear that he was not seeking the land for the purpose of selling it. Page 285 of appellant's brief shows clearly that Congress eliminated the proposed amendment embodying the provision that the land should not be taken for sale. Under the provisions of the Williamson Case, the Budd Case, the Barber Lumber Company case, and other decisions, the courts hold the entryman has a perfect right to take the land with a view to selling it if he desires, subsequent to the time he files his sworn statement. The argument of counsel in relation to the speculative feature of the case is not in point, and does not sustain his contention. The record of Congress produced is conclusive that Congress refused to prohibit an application with a view to sell, provided no agreement for sale prior to filing the application is made. If the transaction is free from any contract or arrangement for sale at that time, direct or in-



direct, and is not then taken for the use and benefit of another, it is not taken for speculation within the meaning of the law as finally enacted. Any speculation resulting from a transaction taking place after the filing of the application is not prohibited.

It seems that counsel has shifted his position from a prior agreement, and from an effort to acquire more land than the law allows to one person, or more than one, to the question of speculation. The appellant started on one theory when this litigation was instituted, (agreement prior to final proof), shifted to another in the trial and the argument in the lower court, (agreement prior to application, and excess acquisition), and then shifts to another in this court. The Williamson and Biggs cases caused the first shift, and the Barber Lumber Company Case caused the second and last to the doctrine of speculation.

Since it is permissible to take the land though with a view to selling it, where there has been no arrangement to sell, the law cannot condemn such a taking on the ground it is speculative. Then what is counsel's definition of the speculation prohibited? Ours is that only *that* speculation is prohibited, which the Statute and the Supreme Court's definition of it prohibits, viz., any speculation rooted in an arrange-



ment in existence at the time of filing. There is no prohibition of any speculation connected with any subsequent deal. A speculation consists of a deal of some kind for profit—some being so bald as to be prohibited, as gambling, or a lottery, and others shading down through every degree to almost every act of buying or investing in anything with hope of profit. The statute draws the line only upon any arrangement existing at the time of filing.

Whatever may have been said in the early debates, while the bill prohibited taking with a view to sale, and limiting to acquisition for use only for fencing, mining, building, etc., etc., when the prohibition against sales was stricken out, there remained nothing to prevent a *subsequent* sale.

“Every interest in lands is the subject of sale and transfer, unless *prohibited by statute*, and *no words allowing it are necessary*.”

St. Louis Smelting & Refining Co. vs. Kemp  
104 U. S. 636-657  
26 L. Ed. 875, 882.

Counsel relies upon the dissenting opinion of Justice McKenna in the case of Haffmann vs. Gross, 199 U. S. 342-349.

As sustaining his contention in regard to speculation. This citation appears at page 289 of appellant's brief. In the dissenting opinion of Justice Mc-

Kenna the justice held that it was unlawful to make the agreement to sell prior to filing, and that the agreement in that case was so made and in violation of the pre-emption law. The majority of the court held the agreement was not in violation of the pre-emption law and that the same should be enforced.

On page 318 of appellant's brief counsel states:

"There was nothing irrational in Robnett telling Kettenbach the condition upon which he had procured Benton to make the entry, as they were all engaged in the same business—the procuring of timber claims unlawfully; and all were acting in concert in that business."

The foregoing statement is unsupported by the evidence. It conclusively appears that Robnett had no connection with the defendants whatever, and the defendants did not procure timber claims unlawfully. The evidence of the Government's own witnesses shows that upon various occasions Robnett concealed his transactions from the defendants, and stated to witnesses that he had no connection with the defendants whatever. Robnett also testified to the same state of facts when he appeared as a witness in the criminal cases hereinabove referred to. Robnett's evidence that he was connected with the defendants is denied by all of the defendants and also by disinterested witnesses who appeared not only for the defendants but for the appellant as well.

The statement appearing on page 318 is unwarranted and unsupported by the evidence.

## KINSFOLK OF KESTER AND KETTENBACH

On page 326, under the heading "Kinsfolk of Kester and Kettenbach who hold titles in trust for them," appears the names of various entrymen who have never transferred their claims to the defendants, or either of them. Counsel contents himself with the broad statement that they are holding these claims in trust for the defendants. There is not a particle of evidence to support it, and the question of paying taxes upon the land, or of accompanying the entrymen and entrywomen to the land, is insufficient to warrant the cancellation of the titles. Then, it appears that upon various occasions money was sent to the Lewiston National Bank for the payment of taxes and as the defendants Kester and Kettenbach were connected with the Lewiston National Bank, the same were paid by them in that way.

## IMPEACHMENT OF WITNESSES

On page 344 of appellant's brief appears the following statement:

“In view of what has been said, showing the conceded hostility of the Government witnesses to the Government, their bias in favor of the defendants, which is disclosed throughout the cross-examination, the Government was frequently surprised in its direct examination, it is clear that counsel for complainant were entitled to cross-examine the witnesses called by them.”

The record does not show that a single witness was hostile to the Government. As was said in the Barber Lumber Company case, the only reason they might appear to be hostile is because their evidence did not sustain the appellant's contention. When a witness's evidence did not sustain appellant's contention, it was then that counsel proceeded to cross-examine the witness and attempt to impeach him in various ways. The record does not justify the action of counsel, nor sustain counsel's contention that he was entitled to even lead the witnesses, much less cross-examine and attempt to impeach them.

## FINAL PROOFS

Counsel contends that he was justified in violating the rule announced in the Williamson Case, the Biggs Case, and others, and in introducing the final proofs as evidence and the statement of the wit-

nesses given upon final proof, and it is with this evidence that counsel sought to impeach his own witnesses and endeavor to induce them to testify in accordance with appellant's contention. If the decisions in the Budd Case, the Williamson Case, the Biggs Case and the Barber Lumber Company Case are to be followed, the admission in evidence, over the defendants' objection, of the final proof papers and evidence of the witnesses given upon final proof, was error.

We respectfully submit that the decree of the district court should be affirmed.

GEO. W. TANNAHILL,

Attorney for Appellées

William F. Kettenbach, George H. Kester,  
William Dwyer, Elizabeth White, Edna P.  
Kester, Martha E. Hallett and Kitty E.  
Dwyer.

